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No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES ROBERT QUARLES, JR.,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent.

On Writ of Certiorari to the Court of Appeals
for the First Appellate District of Ohio
Hamilton County, Ohio

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO HAMILTON COUNTY, OHIO

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITS CONVICTIONS OF CRIMINAL OFFENSES ON CIRCUMSTANTIAL EVIDENCE WHICH IS NOT SUCH AS TO BE IRRECONCILABLE WITH ANY REASONABLE THEORY OF THE INNOCENCE OF THE ACCUSED.

II.

WHETHER THE DUE PROCESS PROTECTION AFFORDED TO A STATE CRIMINAL DEFENDANT AGAINST STATE ABUSE OF STATE SUBSTANTIVE AND PROCEDURAL RULES IS VIOLATED BY THE MISAPPLICATION BY THE STATE COURTS OF THE STATE RULE THAT CIRCUMSTANTIAL EVIDENCE MAY NOT SUPPORT A CONVICTION WHERE A REASONABLE THEORY OF INNOCENCE EXISTS.

III.

WHETHER A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS OF LAW IS VIOLATED WHERE HE IS CONVICTED OF POSSESSION OF CONTROLLED SUBSTANCES IN A MOTEL ROOM IN WHICH (1) IT IS NEVER PROVED HE WAS PRESENT AT THE SAME TIME THAT THE CONTROLLED SUBSTANCES WERE PRESENT; (2) IT IS NEVER PROVED THAT HE WAS IN THE ROOM AT ALL; AND (3) OTHERS WERE ALSO PRESENT, IT NOT BEING SHOWN WHICH (IF ANY) OF THE THREE PERSONS ALLEGEDLY PRESENT IN THE ROOM HAD POSSESSION OF THE CONTROLLED SUBSTANCES UNDER THE STATUTORY DEFINITION OF POSSESSION.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO HAMILTON COUNTY, OHIO

PETITION

James Robert Quarles, Jr., Petitioner herein, respectfully Prays that a writ of certiorari issue to review his conviction of trafficking in drugs, which was affirmed by the Court of Appeals for the First Appellate District of Ohio, Hamilton County, Ohio.

OPINIONS BELOW

Petitioner's conviction was affirmed on June 26, 1985, by the Court of Appeals for the First Appellate District,

Hamilton County, Ohio. A copy of that decision, which is unreported, is appended hereto as Appendix A. The Supreme Court of Ohio declined to review the case on October 16, 1985. A copy of that decision is appended hereto as Appendix B.

JURISDICTION

The decision of the Supreme Court of Ohio denying review was entered October 16, 1985. This Petition is timely filed, and jurisdiction is founded upon 28 U.S.C. 1257(3), Petitioner having asserted below and in this Court deprivation of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

Section 1 . . . nor shall any State deprive any person of life, liberty, or Property, without due Process of law; nor deny to any person within its jurisdiction the equal Protection of the laws.

Ohio Revised Code, Section 2925.01(L):

"Possess" or "possession" means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

Ohio Revised Code, Section 2925.03(A)(4):

(A) No person shall do any of the following:

(4) Possess a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times the bulk amount.

HOW THE FEDERAL QUESTION WAS RAISED BELOW

Petitioner raised the federal question of the violation of due process implicit in his conviction upon legally insufficient evidence by arguing this issue in his direct appeal, citing the due process clause of the Fourteenth Amendment to the Constitution of the United States, and cases from this Court interpreting that provision, principally *In re Winship*, 397 U.S. 358 (1970). "Under the *Winship* decision, it is clear that a state prisoner who alleges that the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim." *Jackson* v. *Virginia*, 443 U.S. 307, 321 (1979).

STATEMENT OF THE CASE

James Robert Quarles, Jr., Petitioner herein, was convicted in the Court of Common Pleas of Hamilton County, Ohio of drug abuse in violation of R.C. 2925.11, and of trafficking in drugs in violation of R.C. 2925.03(A)(4). His appeal as to the first count was successful, but his conviction of the trafficking offense, a second degree felony, was affirmed.. The Ohio Supreme Court declined review.

Before launching into a detailed description of the facts of this case, several facts should be noted, to facilitate consideration of this case:

(1) Petitioner was convicted of trafficking in drugs simply because his fingerprints were found on a wine bottle in a motel room in which controlled substances were discovered. Petitioner's fingerprints were the only evidence connecting him to the inside of that motel room.

(2) While the offense of which Petitioner was convicted is entitled "Trafficking in drugs," the gist of the offense here is merely the possession of controlled substances in an amount equal to or greater than an amount arbitrarily selected by the legislature.

The opinion of the Court of Appeals (*Post.*, 1-a) succinctly sets forth the facts of this case. To demonstrate the injustice wrought upon Petitioner, however, we shall approach the facts from a somewhat different perspective.

As Cincinnati police officer James Werner, attached to the Regional Enforcement Narcotics Unit (RENU), a multidepartmental drug task force, drove past Petitioner's home on December 28, 1983, he saw Petitioner and an unidentified man leave the home about 10:00 P.M. The two men entered a van and drove to a Ramada Inn in nearby Blue Ash, Ohio. The RENU agent followed in his unmarked car.

The agent observed Petitioner and the unidentified man enter the motel, and he saw them leave the motel in the van about one half hour later. The RENU agent had not observed Petitioner after he entered the lobby; the agent did not see Petitioner enter any room.

As Petitioner left the motel, the agent followed; as Petitioner's van neared Petitioner's home, the agent and another officer stopped Petitioner's van even though the RENU agent admitted that he had witnessed no traffic or criminal offense committed by Petitioner. The agent approached the van and sought to confer with Petitioner, who declined and drove away. Rebuffed but not undeterred, the RENU agent contacted the police in Norwood, Ohio (toward which city, only a few blocks from Petitioner's home, the Petitioner's van was headed) and requested that Petitioner be arrested.

As Petitioner drove through Norwood, he was indeed stopped and taken into custody. Petitioner was taken to the Norwood police station where the RENU agent arrived and attempted to interview Petitioner. Petitioner once again refused to discuss matters with the officer, and, no legal basis for his detention having existed, Petitioner was released without being charged.

The RENU agent called the Blue Ash Police, who responded to the Ramada Inn in the early morning hours of December 29. The Blue Ash officer and the motel security

guard went to Room 273, which had been rented in Petitioner's name (though no one ever testified to having seen Petitioner rent the room), and listened at the door; hearing nothing, they phoned the room several times and received no answer. The Blue Ash officer denied the testimony by the security guard that the two men went to an adjacent room and listened through the walls (R. 35, 52). The door to Room 273 was double locked, preventing entry by anyone with the regular room key; entry could only be gained with a special passkey possessed only by motel management or security personnel.

After the two days for which the room had been paid in advance had expired, Blue Ash police and motel personnel entered the room and found several items: a cognac bottle on which Petitioner's fingerprints were discovered, and two glasses, all on a table; in a drawer on the nightstand, police discovered a key ring, keys, a receipt bearing Petitioner's name, several other receipts, a cable television invoice, a piece of glass, razor blades, a small strainer, a box lid containing marijuana residue and a plastic bag containing orange tablets, which analysis revealed to be Obetrol, a controlled substance, possession of which forms the basis of Petitioner's conviction below.

Petitioner was arrested by the original RENU agent, Werner, on January 3, 1984, for the reason, according to Werner, that the Blue Ash police had issued an arrest warrant on that date for Petitioner based upon the discovery of the drugs in Room 273. But the Blue Ash police did not cause the warrant to issue until January 4.

Fingerprints were lifted from Room 273, but the only fingerprints that matched those of Petitioner were taken from the wine bottle. However, two other sets of fingerprints were discovered in the room; one set was identified as belonging to one Duane Richmond, and the other could not be identified. The bed had been slept in (obviously before the door had been double-locked), and the FBI fingerprint expert stated that at least three people had been in the room.

Petitioner proceeded to trial in the Court of Common Pleas of Hamilton County, Ohio, having waived a jury. He was convicted and sentenced to 6-15 years, with three years actual incarceration. He appealed to the Court of Appeals for the First Appellate District, Hamilton County. That court reversed the drug abuse conviction based upon the one Obetrol tablet[1] but convicted Petitioner of the trafficking charge. The court, however, ruled that Petitioner's contention was not contrary to due process as having been based upon legally insufficient evidence, there having been sufficient evidence to support the conviction, and there was insufficient evidence to permit the trier of the fact to find a reasonable theory of innocence to negate the wholly circumstantial nature of the state's evidence. The Ohio Supreme Court declined review and Petitioner hereby files his Petition.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

There are several reasons that this writ should be granted. Certain principles are common to each portion of the argument to follow and shall be discussed before delving into the specific principles applicable to each of the reasons argued below.

The due process clause of the Fourteenth Amendment prohibits convictions of criminal offenses upon legally insufficient evidence, that is, upon evidence which is insufficient to establish the existence of each and every element of the offense beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970). Evidence which is "sufficiently sufficient" to pass this

[1] The court below reversed Petitioner's conviction for possession of one Obetrol found on his person when arrested by Werner because it was seized during an illegal arrest, and Petitioner's motion to suppress that one tablet should have been granted. The court below declined comment on Werner's credibility — or lack thereof — revealed by his testimony that he arrested Petitioner on a warrant which was not issued until a day after that arrest.

test is evidence which convinces a rational factfinder to a subjective state of near certitude of the existence of each such element, *Jackson* v. *Virginia*, 443 U.S. 307 (1979). One of the essential facts which must be established in every criminal case, not usually considered as a separate element of the offense, but proof of which beyond a reasonable doubt is essential to a valid conviction, is the identity of the accused as the person who perpetrated the offense.

Another principle often utilized in assessing the legal sufficiency of the evidence to meet the high due process standard in many, but not all, jurisdictions is the principle that circumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of the accused's innocence in order to support a valid conviction. It is the application of this principle which is our first concern.

I.

A NATIONAL STANDARD IS REQUIRED FOR THE EVALUATION OF CIRCUMSTANTIAL EVIDENCE SO THAT THE LAW IS APPLIED EQUALLY IN ALL JURISDICTIONS SUBJECT TO THE DUE PROCESS CLAUSE.

THE ISSUE

WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES PROHIBITS CONVICTIONS OF CRIMINAL OFFENSES ON CIRCUMSTANTIAL EVIDENCE WHICH IS NOT SUCH AS TO BE IRRECONCILABLE WITH ANY REASONABLE THEORY OF THE INNOCENCE OF THE ACCUSED.

Petitioner here contends that the due process clause requires that, before circumstantial evidence alone can be suffi-

cient to convict of a criminal charge, that evidence must be inconsistent with any reasonable theory of innocence.

We concede that, thirty one years ago, this Court concluded with respect to federal prosecutions that while "[t]here is some support for this type of instruction in the lower court decisions, . . . the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. . . ." *Holland* v. *United States*, 348 U.S. 121 (1954). The federal circuit courts in federal criminal cases have continued to follow *Holland* and to rule that such is not the standard of review for convictions based upon circumstantial evidence.[2]

However, most states have not abandoned the principle. Fully thirty five of the states continue to apply the rule, while only eleven reject the rule; see Appendix C, *post*, at p. 9a.[3] Ohio subscribes to the rule, and the definitive Ohio statement of the rule is found in the syllabus in *State* v. *Kulig*, 37 Ohio St.2d 157, 309 NE2d 897 (1974):

> Circumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt.

The law in this Nation as to this principle is such that whether one, such as Petitioner, is convicted upon such sparse

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[2] *United States* v. *Lochan*, 674 F.2d 960 (1 Cir. 1982); *United States* v. *Barnes*, 604 F.2d 121 (2 Cir. 1979), cert. den. 446 U.S. 907; *United States* v. *Cooper*, 567 F.2d 252 (3 Cir. 1977); *United States* v. *George*, 568 F.2d 1064 (4 Cir. 1978); *United States* v. *Del Aquila-Reyes*, 722 F.2d 155 (5 Cir. 1983); *United States* v. *Fraser*, 709 F.2d 1556 (6 Cir. 1983); *United States* v. *Hardisty*, 645 F.2d 612 (8 Cir. 1981); *United States* v. *Miller*, 688 F.2d 652 (9 Cir. 1982); *United States* v. *Parnell*, 581 F.2d 1374 (10 Cir. 1978), cert. den. *Cox* v. *United States*, 439 U.S. 1076; *United States* v. *Brooks*, 703 F.2d 1273; *United States* v. *Davis*, 562 F.2d 681 (DC Cir. 1977).

[3] No recent cases on this issue from the other four states could be discovered.

and circumstantial evidence as is presented by this record depends not upon whether the circumstantial evidence is sufficiently reliable to justify the conviction, but instead upon the particular jurisdiction in which he is prosecuted.

The Court has previously (albeit in other contexts) considered the practices of the states in determining the meaning to be given to certain provisions of the Bill of Rights as applied to the states through the due process clause of the Fourteenth Amendment. Principally, the Court has considered the practice of the states in enacting and enforcing capital punishment in determining whether the evolving standards of decency of a maturing society required the abolition of the death penalty as violative of the Eighth Amendment prohibition against cruel and unusual punishment, which prohibition is applicable to the states through the Fourteenth Amendment due process clause, *Robinson* v. *California*, 370 U.S. 660 (1962). See, e.g., *Gregg* v. *Georgia*, 428 U.S. 153 (1976).

It is clear that the evolving standards of decency as exhibited by state criminal law principles rather clearly require that circumstantial evidence sufficient for convictions which can withstand constitutional scrutiny must be such as to negate each and every reasonable theory of innocence.

The Court is urged to accept this case for review to decide the important question of whether the due process clause of the Fourteenth Amendment incorporates the rule advanced here.

But the due process clause also protects state criminal defendants against abuses of state procedural and substantive protections, as well as against conviction upon insufficient evidence. Such abuses occurred at Petitioner's trial, and in his appeal in the court below, constituting separate due process violations; it is to these issues that we now turn.

II.

THE STATE OF OHIO VIOLATED PETITIONER'S DUE PROCESS RIGHTS IN CONVICTING AND IMPRISONING HIM IN THE ABSENCE OF PROOF SUFFICIENT TO PROVE HIS GUILT BEYOND A REASONABLE DOUBT, AND IN REFUSING TO APPLY THE CIRCUMSTANTIAL EVIDENCE RULE WHICH IS A PART OF OHIO LAW TO PETITIONER'S ADVANTAGE.

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WHETHER A CRIMINAL DEFENDANT'S RIGHT TO DUE PROCESS OF LAW IS VIOLATED WHERE HE IS CONVICTED OF POSSESSION OF CONTROLLED SUBSTANCES IN A MOTEL ROOM IN WHICH (1) IT IS NEVER PROVED HE WAS PRESENT AT THE SAME TIME THAT THE CONTROLLED SUBSTANCES WERE PRESENT; (2) IT IS NEVER PROVED THAT HE WAS IN THE ROOM AT ALL; AND (3) OTHERS WERE ALSO PRESENT, IT NOT BEING SHOWN WHICH (IF ANY) OF THE THREE PERSONS ALLEGEDLY PRESENT IN THE ROOM HAD POSSESSION OF THE CONTROLLED SUBSTANCES UNDER THE STATUTORY DEFINITION OF POSSESSION.

As stated at the outset, the gist of the offense of which Petitioner was convicted, trafficking in drugs, was the possession

of the controlled substances found in Room 273 of the Ramada Inn on December 30. As has also been stated, Petitioner's contention on appeal was that his conviction could not be affirmed because it depended totally upon circumstantial evidence which was not irreconcilable with any reasonable theory of his innocence.

The first issue discussed here is whether the misapplication of that Ohio rule by the Ohio courts constitutes a violation of Petitioner's due process right under the Fourteenth Amendment of the United States Constitution. It does.

This Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the due process clause of the Fourteenth Amendment," *Vitek* v. *Jones*, 445 U.S. 480 (1980), and whether the protections of the due process clause of the Fourteenth Amendment are due a criminal defendant convicted and sentenced in violation of state protections "depends on the extent to which an individual will be 'condemned to suffer grievous loss,'" *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951, Frankfurter, J., concurring) . . . *Morrissey* v. *Brewer*, 408 U.S. 471 (1972).

Thus, the misapplication of the circumstantial evidence rule by the Ohio courts has, under this set of facts, deprived Petitioner of his right to due process, and he has been condemned to suffer grievous loss — the loss of 3-15 years of liberty.

Despite the convoluted reasoning of the court below in attempting to avoid determining whether a reasonable theory of innocence existed, it merely held that the evidence was such that the *trial court*, the trier of the fact, "was not precluded as a matter of law from excluding a theory of innocence." This abdication of appellate responsibility (admittedly following an Ohio Supreme Court case) flies in the face of the obvious theory of innocence presented by these facts: Petitioner is just as likely as not to have not been present in the room when the drugs were there; he is just as likely as not

to have touched the cognac bottle in a different place and under different circumstances than in the only situation accepted by the Ohio courts: in the motel room when the drugs were also present; and the Ohio law on possession, both under case law and statutes, compels the conclusion that more is required to establish possession than presence in the same room where drugs are found.

An analysis of these points reveals both (1) that the state courts abdicated their responsibility under the due process clause to afford to Petitioner the protection of the evidentiary and other rules established by Ohio statutes and by decisions of the Ohio Supreme Court and other courts, and (2) that under the facts of this case, Petitioner was not convicted with evidence sufficient to satisfy due process, whatever state rules are applied.

A. The fingerprint evidence is insufficient to establish Petitioner's presence in the room where the drugs were found, much less possession of the drugs in question.

It is, of course, true that Petitioner's fingerprints were found on the cognac bottle. It is thus reasonable to infer that Petitioner, at some time before the bottle was recovered and impounded by police, touched the cognac bottle. But that is *all* the fingerprints prove. All parties and courts below seem to conclude that the fingerprints on the bottle mean that Petitioner was in the motel room at some time; and the courts concluded that Petitioner was in the room at the time the drugs were also present. Such conclusions are totally baseless. It is just as reasonable that Petitioner presented the cognac to one of the persons who did occupy the room, but did not enter the room, or have personal access to the drugs; see *United States* v. *Collon*, 426 F.2d 939 (6 Cir. 1970); *Borum* v. *United States*, 380 F.2d 595 (D.C. Cir. 1967); *Hiet* v. *United States*, 365 F.2d 504 (D.C. Cir. 1966); *United States* v. *Stephenson*, 474 F.2d 1353 (5 Cir. 1973), in which even the

fingerprints of the defendant on plastic bags containing heroin was not sufficient to support a conviction for possession, absent evidence that the heroin was in the bags when the fingerprints were impressed. Here, of course, the prints were not on the drugs, or packages containing drugs, but only on a bottle of cognac present in the same room as the drugs; and *People* v. *Jenkins*, 154 Cal. Rptr. 309 (1979), where the presence of the defendant's fingerprints on glass beakers and vials in an illicit drug laboratory operated by his brother was deemed insufficient.

Further, there was no evidence that Petitioner was in the room other than the insufficient fingerprint evidence. While the room was registered to Petitioner's name, no one ever saw him enter the room, or leave it; no one even saw Petitioner register. The RENU man, Werner, only saw Petitioner enter the lobby; the security man, Bauer, only saw Petitioner in the lobby. It is just as reasonable that Petitioner delivered the cognac to a room rented by him for the use of certain other persons, or that he delivered the cognac to such person(s) in the lobby and did not go near the room. All of these possibilities constitute reasonable theories of innocence ignored by the courts below. But Ohio law, correctly applied, should have protected Petitioner from conviction even if it could reasonably be concluded that he was in the motel room, whether or not the drugs were in the room at the same time as Petitioner.

B. Even assuming Petitioner's presence in the room, there was no evidence tending to establish Petitioner was present when the drugs were present.

The room was sealed by police and motel security approximately two or three hours after Petitioner was seen leaving the motel; this lapse of time provided ample opportunity for the taking of drugs into the room after Petitioner left the room, even if it is assumed (it certainly was not proved) that Petitioner was in the room.

Further, an Ohio statute specifically enjoins a conviction for possession based solely upon occupancy of a room in which the drugs are found:

> "Possess" or "possession" means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

R.C. 2925.01(L). Possession may be actual or constructive, and constructive possession may be shown by circumstantial evidence, *State* v. *Hankerson*, 70 Ohio St.2d 87, 434 NE2d 1362, cert. den. 459 U.S. 870 (1982), but that evidence still must exclude every reasonable theory of innocence.

Inferring possession of the drugs by appellant solely from access to the drugs and/or occupancy of the motel room was precisely what occurred below, in violation of the statute. The presence of receipts in Petitioner's name, keys similar to those used in Petitioner's vending machine business could not, certainly, be sufficient to establish his presence, even considering the fact that the room was registered in his name. The state sought to prove possession by showing occupation of the premises; the state failed to show occupation, but even if it did, a correct application of R.C. 2925.01(L) would preclude a finding of possession. This is the case law of Ohio and of other jurisdictions as well: without a showing of actual or constructive personal possession one cannot be convicted of possession of drugs found in his dwelling unit, *State* v. *Haynes*, 25 Ohio St.2d 264, 267 NE2d 787 (1971) (the mere fact that one owns or leases premises is insufficient to establish possession of drugs found thereon where such premises are regularly occupied by others); *Cincinnati* v. *McCartney*, 30 Ohio App.2d 45, 281 NE2d 855 (1971); see also *Brown* v. *State*, 481 P.2d 475 (Okla. App. 1971), *Haley* v. *State*, 253 A.2d 424 (Md. App. 1969).

Occupancy of a motel room where drugs are found, without more, has also been ruled insufficient to establish

possession, *Falin* v. *State*, 367 So.2d 675 (Fla. App. 1979), *Kirtley* v. *State*, 245 So.2d 282 (Fla. App. 1971), *Person* v. *State*, 270 SE2d 319 (Ga. App. 1980).

C. Occupancy of premises by more than one person will defeat a conclusion that such occupancy by any one of them will alone support a finding of possession of drugs found on those premises.

Here, the evidence indicated that at least three persons occupied the motel room (if it is accepted, which we do not concede, that Petitioner's fingerprints on the bottle place him — beyond a reasonable doubt — in the room at all). Where premises are jointly occupied, courts will not infer sufficient dominion and control of contraband found therein from the mere fact of occupancy, R.C. 2925.01(L); *Cincinnati* v. *McCartney*, *supra; Gaynus* v. *Florida*, 380 So.2d 1175 (Fla. App. 1980); *Delgado* v. *United States*, 327 F.2d 641 (9 Cir. 1964) [in which the drugs were found, as here, in the drawer of a nightstand of jointly-occupied premises].

* * *

"The illegal possession of narcotic drugs is a crime which by its very nature is unique to the individual. By definition, the possessor is the only person who could commit this crime. Guilt by association . . . is unacceptable. The fact of possession loses all persuasiveness if persons other than the accused had equal access . . . to the place in which the property was discovered. When the crime charged is the illegal possession of narcotic drugs, the presence of a person at the scene, without a consideration of the totality of the circumstances, does not prove the crime." *Commonwealth* v. *Fortune*, 318 A.2d 327 (Pa. 1974).

Thus, considering the totality of the circumstances, it is clear that Petitioner's conviction rests on legally insufficient evidence in violation of the due process clause, for "[m]ere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person

who does control the drug . . . is insufficient to support a finding of possession." *United States* v. *Valenzuela*, 596 F.2d 824 (9 Cir. 1979).

Had the state courts correctly applied the Ohio rule that circumstantial evidence must exclude every reasonable theory of innocence; had the Ohio courts applied the Ohio statute that precludes conviction under these circumstances, R.C. 2925.01(L); had the Ohio courts followed the decision of the Ohio Supreme Court, and of the court below as well, then Petitioner would never have been convicted, and his conviction would never have been affirmed. Curiously, Duane Richmond, whose fingerprints were discovered in the motel room as well, was not prosecuted, though he is equally culpable.

It is evident that the RENU agent was "after" Petitioner because Petitioner possessed a prior drug conviction. The several violations of due process, and other constitutional rights, which preceded the conviction underscore the violations of which we complain here: the groundless surveillance of Petitioner's activities; the illegal arrest of Petitioner by Norwood police at the behest of RENU agent Werner on the night of the 28th; the sealing of the room at the motel, denying access thereto to whomever had paid for it for two days without police or security presence (though it was never established that Petitioner rented the room, and hence would have no personal rights violated by this action), and finally the illegal arrest of Petitioner by Werner on a "warrant" relied upon by the officer (he said) but which was not issued until the next day — all of these outrages indicate that this Petitioner's consitutional rights were considered meaningless by officer Werner, and his constitutional rights as well as his rights under state law were rendered meaningless by the Ohio courts. The result is that, unless this case is reviewed and reversed by this Court that Petitioner will commence experiencing the "grievous loss" of his freedom for at least three, and possibly fifteen years.

The result of this case, and its importance, rests with the fact that if convictions such as this can be upheld, then no citizen is safe; if any person in possession of the power routinely reposited in each of the hundreds of thousands of peace officers in this country decides that society will be better off if any particular citizen is removed from it, then this case will stand as a textbook example on how to accomplish such a goal.

Between any such citizen and the unbridled abuse of such power stands the law; not only the Bill of Rights, but the laws of the states. Where the states refuse to enforce the rights of their citizens under circumstances such as are present here, then the due process clause of the Fourteenth Amendment is violated; finally, the due process clause itself is violated by the conviction of any person on circumstantial evidence which does not exclude every reasonable theory of innocence. And the most reasonable theory of innocence is the lack of any evidence whatever that the accused committed the offense of which he is accused.

CONCLUSION

For the reasons stated, the Court is respectfully urged to grant the Petition for Writ of Certiorari, and to review and reverse Petitioner's conviction as an affront to the Constitution.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-840672
TRIAL NO. B-840405

STATE OF OHIO,
Plaintiff-Appellee,
vs.
JAMES ROBERT QUARLES, JR.,
Defendant-Appellant.

DECISION
(Filed June 26, 1985)

Criminal Appeal from: Court of Common Pleas

Judgment appealed from is: Affirmed in part and reversed and appellant discharged in part

Date of Judgment Entry on Appeal: June 26, 1985

Messrs. Arthur M. Ney, Jr., Steven Calardo and Ms. Judith A. Anton, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee.

Mr. John Andrew West, 3886 Reading Road, Cincinnati, Ohio 45229, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers

from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the oral arguments of counsel.

This timely appeal follows appellant's convictions of drug abuse in violation of R.C. 2925.11 and trafficking in drugs in violation of R.C. 2925.03(A)(4). The trial court further found that appellant had been previously convicted of a felony drug abuse offense.

The record reveals that on December 28, 1983 at approximately 10:00 p.m., a Cincinnati police officer assigned to the Regional Enforcement Narcotics Unit (RENU) saw appellant and a passenger enter a van which was parked in front of appellant's home. The RENU agent followed appellant to a Ramada Inn in Blue Ash, Ohio. According to his testimony, the RENU agent observed appellant and the passenger exit the van and enter the Ramada Inn. The agent did not see appellant enter any room in the motel. A security guard at the motel saw appellant walk through the lobby on his way out of the motel. Approximately thirty minutes after they entered the motel, the agent observed appellant and the passenger exit the motel, whereupon the agent followed them to appellant's home on Ledgewood Drive.

When the van stopped on Ledgewood Drive, the RENU agent approached the van on the passenger side. The agent testified that he had not observed any violation of the law. Further, the agent testified that he was not attempting to arrest appellant. When the agent reached the van, appellant drove away. The RENU agent contacted the Norwood Police Department and requested that they stop appellant. Subsequently, appellant was stopped and detained by the Norwood police. The RENU agent interviewed appellant at the Norwood police station. Appellant denied being at the Ramada Inn. Following the interview appellant was released, no charges being filed against appellant at that time.

The RENU agent relayed his suspicions about appellant's activities to the Blue Ash Police Department. An officer from the Blue Ash Police Department proceeded to the Ramada Inn. The motel security guard showed the officer the room

for which appellant had registered; however, the room was not entered at that time. The officer made several unanswered telephone calls to the room. At approximately 1:00 or 1:30 a.m. on December 29, 1983, the security guard double locked the door of the motel room, denying anyone without a passkey access to the room. Evidence was adduced at trial that only the security guard, the manager and the night manager of the Ramada Inn had passkeys which would open the double lock.

The record reveals that although a registration card for a motel room had been filled out in appellant's name, no witnesses testified that they had observed appellant sign the card. Payment for the room had been made in advance for the nights of December 28 and 29, 1983. In the afternoon of December 30, 1983 the motel manager, Mr. Carr, opened the room. An officer from the Blue Ash Police Department was present. Carr testified that it appeared that someone had slept in the bed. Carr also observed a bottle and two glasses on a table.

The Blue Ash police officer testified that he searched the room and dusted for fingerprints. In a drawer of a nightstand next to the bed the officer found a key ring, keys, a receipt bearing appellant's name, several other receipts, a box of straws, some rolling papers, a cable television invoice addressed to a Ledgewood Drive address, an envelope containing a Ledgewood Drive return address, a piece of glass, razor blades, a small strainer, a box lid containing marijuana residue and a plastic bag containing orange tablets. Subsequently, the tablets proved to be Obetrol. These tablets form the basis of the charge in count two of the indictment, trafficking in drugs. The officer attempted to lift fingerprints from several items found in the room including a bottle of cognac, the box lid, the drinking glasses, the small strainer, a silver bowl and the bag which contained the orange tablets. Appellant's fingerprints were found on the bottle of cognac. In addition, two other sets of fingerprints were found on some of the items recovered from the motel room. One set of

fingerprints was identified, however the other set remains unidentified.

The RENU agent testified that on January 3, 1984 he arrested appellant for drug abuse pursuant to a complaint and warrant previously issued by the Blue Ash police. However, the evidence showed that the complaint and warrant were not issued until January 4, 1984, one day after appellant's arrest. At the time he arrested appellant, the RENU agent reached into appellant's pocket and retrieved one tablet of Obetrol. This tablet forms the basis of the drug abuse charge in count one of the indictment.

Appellant was indicted for drug abuse and trafficking in drugs. Both counts of the indictment contained the specification that appellant had been previously convicted of a felony drug abuse offense. Appellant was found guilty as charged and sentenced as appears of record.

Appellant's first assignment of error alleges:

> The trial court substantially erred to the prejudice of appellant in overruling appellant's Criminal Rule 29 motions for judgment of acquittal, as to count two of the indictment.

The Supreme Court of Ohio has stated in *State* v. *Bridgeman* (1978), 55 Ohio St. 2d 261, 381 N.E.2d 184, syllabus:

> Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.

In the case *sub judice*, appellant was seen entering the Blue Ash Ramada Inn on December 28, 1983. A registration card for room 273 was filled out in appellant's name. The room was paid in advance for two nights. One half hour after entering the Ramada Inn, appellant was seen exiting the motel. Approximately sixty to ninety minutes later room 273

was double locked, denying access to anyone without a passkey. When appellant was stopped by a police officer he denied having been at the Ramada Inn.

On December 30, 1983, room 273 was opened and searched. In a nightstand near the bed a quantity of Obetrol pills were found. A receipt bearing appellant's name was also found in the nightstand. In addition, keys to several vending machines were recovered. Appellant owns a vending machine business. Appellant's fingerprints were found on a cognac bottle in the room.

We find that in the instant case there was sufficient evidence adduced at trial from which reasonable minds could reach differing conclusions as to whether each element of the crime of trafficking in drugs had been proved beyond a reasonable doubt.

Appellant also argues under his first assignment of error that his conviction should be reversed because he presented a reasonable theory of innocence in the face of circumstantial evidence. We disagree.

The Supreme Court of Ohio has stated that a determination of reasonableness includes a determination of whether the theory is reasonable in light of the weight and credibility the trier of fact gives to the evidence. *State* v. *Hankerson* (1982), 70 Ohio St. 2d 87, 92, 434 N.E.2d 1362, 1366, *cert. denied* 459 U.S. 870, 103 S. Ct. 155; *State* v. *Graven* (1978), 54 Ohio St. 2d 114, 119, 374 N.E.2d 1370, 1373. After the trier of fact has rendered his verdict in a case in which circumstantial evidence has been relied upon, an appellate court will reverse that verdict only where the evidence is insufficient as a matter of law to enable the trier of fact to exclude a reasonable theory of innocence. *Id.* The trial court in the matter *sub judice* obviously found that no theory of innocence was reasonable in light of the weight and credibility which he gave to the evidence. We hold that the evidence in the instant case is such that the trial court was not precluded as a matter of law from excluding a theory of innocence.

Appellant's first assignment of error is overruled.

Appellant's second assignment of error alleges that appellant's conviction for trafficking in drugs was against the manifest weight of the evidence. Following a complete review of the record, we cannot say that such a manifest miscarriage of justice was created that appellant's conviction must be reversed.

In addition, appellant reiterates the argument under his first assignment of error that his conviction for trafficking in drugs was based upon legally insufficient evidence. We find that there was substantial evidence upon which the trial court could reasonably believe that all elements of the offense of trafficking in drugs had been proved beyond a reasonable doubt. *State* v. *Eley* (1978), 56 Ohio St. 2d 169, 383 N.E.2d 132.

Appellant's third assignment of error alleges:

> The trial court substantially erred to the prejudice of appellant in overruling the motion to suppress evidence as to count one of the indictment.

In the case *sub judice*, the RENU agent arrested appellant on January 3, 1984. At that time, the agent reached into appellant's pocket and recovered one tablet of Obetrol. This tablet formed the basis for appellant's conviction of drug abuse pursuant to count one of the indictment. The RENU agent testified that he made the arrest pursuant to a warrant signed by an officer of the Blue Ash Police Department. The record reveals that the complaint and arrest warrant were signed and filed on January 4, 1984. Appellant argues that his arrest on January 3, 1984 was a warrantless, unlawful arrest and that therefore, appellant's motion to suppress the evidence recovered at the time of his arrest and search should have been granted. We agree.

Appellee argues that the RENU agent had probable cause to arrest appellant as the agent had knowledge of the drugs found at the Ramada Inn on December 30, 1983. The record is devoid of evidence to support appellee's argument. In addition, the RENU agent specifically testified that he arrested

appellant pursuant to a warrant issued by the Blue Ash Police Department. Under these circumstances, we find that the arrest of appellant was warrantless and unlawful. Therefore, appellant's motion to suppress should have been granted. Appellant's third assignment of error is sustained. There being no other evidence to sustain appellant's conviction for drug abuse, we accordingly reverse appellant's conviction for drug abuse as charged in count one of the indictment.

Appellant's conviction for trafficking in drugs pursuant to count two of the indictment is affirmed. Appellant's conviction for drug abuse pursuant to count one of the indictment is reversed and appellant is hereby discharged as to this count.

SHANNON, P.J., DOAN and HILDEBRANDT, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B

THE SUPREME COURT OF OHIO,
COLUMBUS

1985 TERM
Case No. 85-1349

STATE OF OHIO,

Appellee,

v.

JAMES R. QUARLES, JR.,

Appellant.

ENTRY
(To wit: October 16, 1985)

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial consitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by John Andrew West.

FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date _____.

JAMES WM. KELLY, Clerk
SAM F. ADKINS, Deputy

APPENDIX C — POSITIONS OF STATES ON QUESTION OF WHETHER A CONVICTION FOR A CRIMINAL OFFENSE BASED ON CIRCUMSTANTIAL EVIDENCE MAY NOT STAND UNLESS SUCH EVIDENCE EXCLUDES EVERY REASONABLE THEORY OF INNOCENCE.

A. STATES ADOPTING THE RULE THAT CIRCUMSTANTIAL EVIDENCE RELIED UPON TO PROVE AN ESSENTIAL ELEMENT OF A CRIME MUST BE IRRECONCILABLE WITH ANY REASONABLE THEORY OF AN ACCUSED'S INNOCENCE IN ORDER TO SUPPORT A FINDING OF GUILT:

1. ALABAMA — *Johnston* v. *State*, 387 So.2d 891 (1980)
2. ALASKA — *Davis* v. *State*, 369 P.2d 879 (1962)
3. ARKANSAS — *Duncan* v. *State*, 588 S.W.2d 432 (1979)
4. CALIFORNIA — *People* v. *Salas*, 129 Cal. Rptr. 871 (1976)
5. CONNECTICUT — *State* v. *Gonzalez*, 407 A.2d 968 (1978)
6. FLORIDA — *Peek* v. *State*, 395 So.2d 492, cert. den. 451 US 964 (1981)
7. GEORGIA — *Williams* v. *State*, 235 S.E.2d 504 (1977)

8. ILLINOIS — *People* v. *Johnson*, 422 NE2d 50 (1981)
9. INDIANA — *Hall* v. *State*, 405 NE2d 530 (1979)
10. IOWA — *State* v. *McDaniel*, 265 NW2d 917 (1978)
11. LOUISIANA — *State* v. *Gould*, 395 So.2d 647 (1980)
12. MASSACHUSETTS — *Com.* v. *Shapiro*, 411 NE2d 1332 (1980)
13. MICHIGAN — *People* v. *Clay*, 289 NW2d 888 (1980)
14. MINNESOTA — *State* v. *Gibbons*, 305 NW2d 331
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16. MISSOURI — *State* v. *Biddle*, 599 SW2d 182 (1980)
17. MONTANA — *State* v. *Lucero*, 693 P.2d 511 (1984)
18. NEBRASKA — *State* v. *Doyle*, 287 NW2d 59 (1980)
19. NEW MEXICO — *State* v. *Peden*, 512 P.2d 691 (1973)
20. NEW YORK — *People* v. *Pizza*, 397 NE2d 700 (1979)
21. NORTH CAROLINA — *Phelps* v. *Winston-Salem*, 157 SE2d 719 (1967)
22. NORTH DAKOTA — *State* v. *Olsen*, 290 NW2d 664 (1980). [But in North Dakota the rule is not binding on appellate courts, only on trial courts.]
23. OHIO — *State* v. *Sorgee*, 377 NE2d 782 (1978)
24. OKLAHOMA — *Hager* v. *State*, 612 P.2d 1369 (1980)
25. OREGON — *State* v. *Kurmmacher*, 523 P.2d 1009 (1974)
26. SOUTH CAROLINA — *State* v. *Wheeler*, 193 SE2d 515 (1972)
27. SOUTH DAKOTA — *State* v. *Schaefer*, 297 NW2d 473 (1980)
28. TENNESSEE — *Williams* v. *State*, 552 SW2d 772 (1977)

29. TEXAS — *Swink* v. *State*, 617 SW2d 203 (1981), cert. den.454 U.S. 1087

30. UTAH — *State* v. *John*, 586 P.2d 410 (1978)

31. VERMONT — *State* v. *Bushey*, 400 A.2d 993 (1979)

32. VIRGINIA — *Lyons* v. *Petersburg*, 266 SE2d 880 (1980)

33. WEST VIRGINIA — *State* v. *Key*, 275 SE2d 924 (1981)

34. WISCONSIN — *Frankovis* v. *State*, 287 NW2d 791 (1980)

35. WYOMING — *Lewallen* v. *State*, 536 P.2d 148 (1975)

A. STATES REJECTING THE RULE THAT CIRCUMSTANTIAL EVIDENCE RELIED UPON TO PROVE AN ESSENTIAL ELEMENT OF A CRIME MUST BE IRRECONCILABLE WITH ANY REASONABLE THEORY OF AN ACCUSED'S INNOCENCE IN ORDER TO SUPPORT A FINDING OF GUILT:

1. ARIZONA — *State* v. *Clovis*, 618 P.2d 245 (1980)
2. DELAWARE — *Cook* v. *State*, 374 A.2d 264 (1977)
3. COLOARDO — *People* v. *Christian*, 632 P.2d 1031 (1981)
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7. MARYLAND — *Hines* v. *State*, 473 A.2d 1335 (1984)
8. NEW HAMPSHIRE — *State* v. *Dupuy*, 395 A.2d 851 (1978)
9. NEW JERSEY — *State* v. *Kay*, 376 A.2d 978 (1977) this is a lower court case; no Supreme Court cases were discovered)
10. PENNSYLVANIA — *Com.* v. *Cox*, 333 A.2d 917 (1975)
11. WASHINGTON — *State* v. *Isom*, 567 P.2d 246 (1977)

Supreme Court, U.S.
FILED
JAN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-1044

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

JAMES ROBERT QUARLES, JR.

Petitioner

vs.

THE STATE OF OHIO

Respondent

On Writ of Certiorari to the Court of Appeals
for the First Appellate District of Ohio
Hamilton County, Ohio

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS FOR THE FIRST DISTRICT OF OHIO, HAMILTON COUNTY, OHIO

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QUESTIONS PRESENTED FOR REVIEW

I.

WILL THE UNITED STATES SUPREME COURT CONSIDER A CLAIMED VIOLATION OF A FEDERAL CONSTITUTIONAL STANDARD OF REVIEW FOR CIRCUMSTANTIAL EVIDENCE WHICH WAS NOT RAISED IN ANY FASHION IN THE STATE COURTS?

II.

WHETHER, AFTER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT?

III.

WHEN THE EVIDENCE SHOWS THAT PETITIONER RENTED A MOTEL ROOM, WAS SEEN ENTERING AND LEAVING, WHERE HIS FINGERPRINTS ARE FOUND IN THE MOTEL ROOM, WHERE VARIOUS ITEMS BELONGING TO PETITIONER ARE IN A DRAWER ALONG WITH ILLEGAL NARCOTICS, WHERE PETITIONER LATER DENIES BEING IN THE ROOM, AND WHERE THE ROOM REMAINS LOCKED UNTIL BEING SEARCHED, CAN A RATIONAL TRIER OF FACT DETERMINE THAT PETITIONER POSSESSED THE NARCOTICS?

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BY PETITIONER IN A DRAWER WITH ITEMS BELONGING TO PETITIONER, WHERE PETITIONER WAS SEEN ENTERING AND LEAVING THE MOTEL, WHERE HIS FINGERPRINTS ARE FOUND IN THE ROOM AND WHERE, WHEN QUESTIONED, PETITIONER DENIES BEING IN THE ROOM.

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O.R.C. 2929.03(A)(4) 2

No. 85-1044

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JAMES ROBERT QUARLES, JR.

Petitioner

vs.

THE STATE OF OHIO

Respondent

On Writ of Certiorari to the Court of Appeals for the First Appellate District of Ohio Hamilton County, Ohio

---

REPLY BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO COURT OF APPEALS FOR THE FIRST DISTRICT OF OHIO, HAMILTON COUNTY, OHIO

OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Court of Appeals for the First Appellate District, Hamilton County, Ohio, rendered a decision in this matter on June 26, 1985. That decision is setout as Appendix "A". The Ohio Supreme Court declined to review this case on October 16, 1985. The Ohio Supreme Court's Judgment Entry is set out as Appendix "B".

JURISDICTION

This Court has authority to review this case by a Writ of Certiorari as provided in 28 U.S.C. Section 1257.

STATUTORY PROVISIONS INVOLVED

Ohio Revised Code Section 2925.03(A)(4)
[Trafficking in Drugs]

"(A) No person shall knowingly do any of the following:

* * *

(4) Possess a controlled substance in an amount equal to or exceeding the bulk amount but in an amount less than three times that amount;"

O.R.C. 2925.01(L) [Definitions]

"(L) 'Possess' or 'possession' means having control over a thing or substance but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."

STATEMENT OF THE CASE

Petitioner was indicted by the Hamilton County Grand Jury on February 23, 1984, on one count of Drug Abuse in violation of R.C. 2925.11[1] and one count of Trafficking in violation of R.C. 2929.03(A)(4). He pled not guilty, and was tried before Common Pleas Court Judge William J. Morrissey on July 11, 1984, without the intervention of a jury.

The evidence presented demonstrated on Count #2 that Regional Enforcement Narcotics Agent James Werner was working on December 28, 1983, in routine surveillance of matters concerning drug trafficking. He drove by petitioner's house on Ledgewood Drive and saw him as he got into his van with another man and drove away. Officer Werner knew

[1] The facts regarding Count #1 are not presented. It involved the arrest of petitioner on January 3, 1984. The Court of Appeals reversed because the Motion to Suppress evidence found during the second arrest should have been granted.

petitioner's past included drug dealings. He followed the van until it was parked at the Ramada Inn on Pfeiffer Road. Petitioner and the man went into the Ramada Inn. (T.p. 13) Thirty minutes later, petitioner and the other man left the motel. They parked near his home on Ledgewood. (T.p. 13)

Officer Werner walked up to the passenger side of the van, and identified himself as a police officer. (T.p. 13) Immediately, petitioner pulled away, and drove out of sight. (T.p. 14) Officer Werner radioed for assistance, and petitioner was stopped in Norwood. (T.p. 14)

Officer Werner went to the Norwood police station, and spoke with petitioner. He asked him where he had been coming from, and he said he was just driving around. He was asked why he fled when Officer Werner identified himself as a police officer. (T.p. 14) He responded that he had been having problems with his wife and panicked. The officer asked him if he threw anything out of the window, and he said he thought about throwing some money out, but decided to keep it. He thought maybe the police were after him to give his money to his wife. (T.p. 14) He specifically denied being at the Ramada Inn that day. (T.p. 15) Petitioner was then released from the police station.

Evidence showed that James Quarles registered and paid for two nights at the Ramada Inn, beginning December 28, 1983. (T.p. 44) When he left the Inn the night of the 28th, his room was secured with an extra lock which could only be opened by motel personnel. When petitioner's rental time had expired at 2 p.m. December 30, his room was unlocked by the motel manager, and police examined it. (T.p. 47)

Detective Fox, of the Blue Ash Police Department, searched the room and dusted for fingerprints. (T.p. 59) Nearly all the evidence presented at trial was found in a dresser drawer next to a bed. State's Exhibit #6 is a photograph depicting this evidence as Detective Fox found it. (T.p. 84)

Several receipts with petitioner's name were found in the drawer. One indicated that on December 16, 1983, he fully paid for a $2,100.00 raccoon coat with fox fur. Another indicated a cash payment on December 12, 1983, for a $296.98 item from Sears. (State's Exhibit #24) A piece of smooth glass, two razors, a small strainer, a box of straws and a baggie with 128 orange tablets were found in the drawer. A shoe box lid with marijuana and rolling papers lay on top of the above-listed items. (T.p. 59)

Officer Fox knew petitioner owned a vending company. (T.p. 80) In the same drawer, he found several large key rings. One had 38 small brass keys; another had 17 assorted keys, including car or truck keys. Another contains several vending machine keys, including one specifically made for a soft drink machine. (See contents of Exhibit #27) An anti-theft device specially designed to unlock mag wheels which have been secured by a lock was found in the same drawer.

Fingerprints were found in the room on a bottle of Remy Martin cognac. Fingerprint expert Alvin L. Robinson, Jr., testified that petitioner's fingerprints matched those found on the cognac bottle. (T.p. 91) Other prints also indicated two other persons had been in the room with him at some time. (T.p. 93, 94)

The Obetrol tablets in the baggie were tested on January 3, and found to be an amphetamine, a Schedule II stimulant. (State's Exhibit #2) Based upon the above evidence, petitioner was found guilty on Count #2 of the indictment. Petitioner was sentenced on August 1, 1984, to serve two years on count one, and six to 15 years on count two with three years actual incarceration concurrently, in the Ohio Penitentiary.

An appeal was filed on August 30, 1984, to the First District Court of Appeals. That Court affirmed, in part, by Decision of June 26, 1984. (Appendix "A") The Court of Appeals reversed the conviction on Count #1 because it was based upon improperly seized evidence at the time of petitioner's arrest.

Thereafter, the Ohio Supreme Court declined to review this case. (See Appendix "B") A Petition for Writ of Certiorari was then filed.

ARGUMENT ON REASONS FOR DENYING WRIT

I.

PETITIONER WAIVED ANY CLAIM THAT SOME, AS YET UNANNOUNCED, NATIONAL STANDARD FOR REVIEWING CIRCUMSTANTIAL EVIDENCE WAS VIOLATED BY NOT RAISING SUCH A CLAIM IN THE STATE COURTS.

The primary issue in the Petition for a Writ of Certiorari was never raised in any way in the Ohio Court of Appeals. For the convenience of this Court, we have set out all assignments of error and issues presented for review to the Court of Appeals by petitioner's in Appendix "C". Nowhere is there any indication that petitioner claimed a national standard of review of circumstantial evidence exists. Petitioner relied on the Ohio Supreme Court cases of *State* v. *Kulig*, 37 Ohio St.2d 157 (1974) and *State* v. *Graven*, 54 Ohio St.2d 114 (1978) which established a state test for sufficiency of circumstantial evidence. Petitioner cited numerous federal authorities and claimed the evidence insufficient. The Due Process Claim in the Court of Appeals [Petitioner's entire argument on Due Process is set out as Appendix "D"] was simply that "the question is whether the record contains evidence from which the trier of facts would be justified in concluding that petitioner was guilty beyond a reasonable doubt."[2]

In *Moore* v. *Illinois*, 408 U.S. 786 (1972) at 799, this Court stated:

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[2] This is not an accurate statement of the law. See *Jackson* v. *Virginia*, supra.

> "Of course, the issue whether the shotgun was properly admitted into evidence under Illinois law is not subject to review here. The due process claim, however, appears to be raised for the first time before us. There is no claim by Moore, and there is nothing in the record to disclose, that due process was argued in the state courts. We could conclude, therefore, that the issue is not one properly presented for review."

This case is consistent with the prior decisions of this Court in *Beck* v. *Washington*, 369 U.S. 541 (1962) and *Silber* v. *United States*, 370 U.S. 717 (1962). Therefore, an issue is not properly presented for review when the federal constitutional argument is presented for the first time in a Petition for Writ of Certiorari.

The Ohio Supreme Court has always followed the rule recently set out in the syllabus paragraphs of *State* v. *Williams*, 51 Ohio St.2d 112 (1977) which provides:

> "1. An appellate court need not consider an error which a party complaining of the trial court's judgment could have called but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court. (Paragraph one of the syllabus of *State* v. *Glaros*, 170 Ohio St. 471, approved and followed.)
>
> 2. The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court. (*Toledo* v. *Reasonover*, 5 Ohio St.2d 22, approved and followed)"

Thus, any issue not presented to the trial courts of Ohio or the Ohio Courts of Appeals will not be considered by the Ohio Supreme Court and is not properly before this Court.

Clearly, petitioner's failure to raise any issues, other than sufficiency of evidence, before the Ohio Court of Appeals, should constitute a waiver of those issues before this Court.

II.

THE NATIONAL FEDERAL STANDARD FOR REVIEWING SUFFICIENCY OF EVIDENCE ESTABLISHED BY THE UNITED STATES SUPREME COURT IS WHETHER, AFTER VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE PROSECUTION, ANY RATIONAL TRIER OF FACT COULD HAVE FOUND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

The United States Supreme Court has set out a test for determining whether a criminal conviction is based upon sufficient evidence. In *Jackson* v. *Virginia*, 443 U.S. 307, 99 S.Ct. 2781 (1979) at 319, 2789 has held:

> "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have fould the essential elements of the crime beyond a reasonable doubt. See *Johnson* v. *Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624-1625."

The rationale for this standard was set out as follows:

> "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light

> most favorable to the prosecution. The criterion thus impinges upon 'jury' discretion only to the extent necessary to guarantee the fundamental protection of due process of law."

This is the standard for reviewing trial decisions in criminal cases.

This Court has on several occasions discussed circumstantial evidence and its use. In *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500, 77 S.Ct. 449 (1957) in footnote 17 this Court observed:

> "Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence. *The Robert Edwards*, 6 Wheat, 187, 190, 5 L.Ed. 238."

In *Holland* v. *United States*, 348 U.S. 121, 139, 140, 75 S.Ct. 127, 137 (1958), this Court explained:

> "The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilty. There is some support for this type of instruction in the lower court decisions, *Garst* v. *United States*, 4 Cir., 180 F. 339, 343; *Anderson* v. *United States*, 5 Cir., 30 F.2d 485-487; *Stutz* v. *United States*, 5 Cir., 47 F.2d 1029, 1030; *Hanson* v. *United States*, 6 Cir., 208 F.2d 914, 916 but the better rule is that where the jury is properly instructed on the standards for reasonable doubt, such an additional instruction on circumstantial evidence is confusing and incorrect. *United States* v. *Austin-Bagley Corp.*, 2 Cir., 31 F.2d 229, 234, certiorari denied, 279 U.S. 863, 49 S.Ct. 479, 73 L.Ed. 1002; *United States* v. *Becker*, 2 Cir., 62 F.2d 1007, 1010; 1 Wigmore, Evidence (3d ed.), §§ 25-26."

This Court went on to explain:

> "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." *Holland* v. *United States*, supra at 140; 137, 138.

Thus, the specific test advanced by petitioner has been rejected by this Court. Instead, the test to be applied to sufficiency of evidence questions is that set out in *Jackson* v. *Virginia*, supra. This test applies to either direct or circumstantial evidence.

This Court has come to this conclusion in *Tibbs* v. *Florida*, 457 U.S. 31, 102 S.Ct. 2211 (1982) at footnote 11 which specifically rejected the test which defendant argues this Court adopt. In the footnote this Court cites with approval the following quotation from *United States* v. *Lincoln*, 630 F.2d 1313 (CA 8, 1980):

> "The court reviewing the sufficiency of the evidence, whether it be the trial or appellate court, must apply familiar principles. It is required to view the evidence in the light most favorable to the verdict, giving the prosecution the benefit of all inferences reasonably to be drawn in its favor from the evidence. The verdict may be based in whole or in part on circumstantial evidence. The evidence need not exclude every reasonable hypothesis except that of guilt. . . ." *Id.*, at 1316.

It is therefore respectfully submitted that no new due process standard need be adopted for circumstantial evidence. In some cases, circumstantial evidence is more reliable than testimonial evidence. A jury instruction on circumstantial

evidence can be misleading. In any case, a trier of facts must weigh probabilities using its experience with people and events. If the trier of facts enters a finding of guilt beyond a reasonable doubt, that finding will not be disturbed by a reviewing court where, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential element of the crime beyond a reasonable doubt.

III.

A REVIEWING COURT WILL NOT REVERSE A DECISION BY A TRIER OF FACT FINDING PETITIONER GUILTY OF POSSESSION OF ILLEGAL NARCOTICS WHERE THE NARCOTICS ARE FOUND IN A LOCKED MOTEL ROOM RENTED BY PETITIONER IN A DRAWER WITH ITEMS BELONGING TO PETITIONER, WHERE PETITIONER WAS SEEN ENTERING AND LEAVING THE MOTEL, WHERE HIS FINGERPRINTS ARE FOUND IN THE ROOM AND WHERE, WHEN QUESTIONED, PETITIONER DENIES BEING IN THE ROOM.

As demonstrated above, the test from *Jackson* v. *Virginia*, supra, should be applied in reviewing the trial court's decision. That test is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The Ohio Court of Appeals conducted such a review using the test from *State* v. *Eley*, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978). The syllabus from *State* v. *Eley*, supra, states:

> "A reviewing court will not reverse a jury verdict where there is substantial evidence from which a jury could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt."

Thus, a standard essentially the same as that required in *Jackson* was applied.

Further, the Ohio Circumstantial Evidence standard, which petitioner urges this Court to adopt, was set out in the syllabus of *State* v. *Kulig*, supra, as:

> "Circumstantial evidence relied upon to prove an essential element of a crime must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt."

This, of course, must be read with the standard of review from *State* v. *Graven*, supra, a per curiam opinion which explained:

> "Thus, once the jury has reached its decision, an appellate court, in a case where circumstantial evidence is relied upon, will reverse only where the evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence."

On any of the above standards of review, there was, as demonstrated below, sufficient proof of knowing possession of the controlled substance [Obetrol].

The facts, recited in greater detail above, showed the room was rented in petitioner's name. Petitioner's fingerprints were found on items in the room. Items belonging to petitioner were found with the controlled substance. Petitioner, when questioned by police, specifically denied being at the motel. Petitioner, despite his denial, was seen entering and leaving the motel. The door to the motel room remained double locked until the rental period expired and the motel manager opened it. Based upon the above, it is submitted that all essential elements were sufficiently supported by the evidence to meet all tests set out above.

CONCLUSION

Petitioner's only claim at the State level was that the evidence was insufficient. As demonstrated above, there was sufficient evidence, construed in the light most favorable to the prosecution, for a rational trier of fact to conclude that all essential elements of the offense were proved beyond a reasonable doubt.

Respectfully,

ARTHUR M. NEY, Jr.
Prosecuting Attorney

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Assistant Prosecuting Attorney
Counsel of Record

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APPENDIX A

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NO. C-840672
TRIAL NO. B-840405

STATE OF OHIO,
Plaintiff-Appellee,

vs.

JAMES ROBERT QUARLES, JR.,
Defendant-Appellant.

DECISION

(Filed June 26, 1985)

Criminal Appeal from: Court of Common Pleas

Judgment appealed from is: Affirmed in part and reversed and appellant discharged in part

Date of Judgment Entry on Appeal: June 26, 1985

Messrs. Arthur M. Ney, Jr., Steven Calardo and Ms. Judith A. Anton, 420 Hamilton County Courthouse, Court and Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee,

Mr. John Andrew West, 3886 Reading Road, Cincinnati, Ohio 45229, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the oral arguments of counsel.

This timely appeal follows appellant's convictions of drug abuse in violation of R.C. 2925.11 and trafficking in drugs in violation of R.C. 2925.03(A)(4). The trial court further found that appellant had been previously convicted of a felony drug abuse offense.

The record reveals that on December 28, 1983 at approximately 10:00 p.m., a Cincinnati police officer assigned to the Regional Enforcement Narcotics Unit (RENU) saw appellant and a passenger enter a van which was parked in front of appellant's home. The RENU agent followed appellant to a Ramada Inn in Blue Ash, Ohio. According to his testimony, the RENU agent observed appellant and the passenger exit the van and enter the Ramada Inn. The agent did not see appellant enter any room in the motel. A security guard at the motel saw appellant walk through the lobby on his way out of the motel. Approximately thirty minutes after they entered the motel, the agent observed appellant and the passenger exit the motel, whereupon the agent followed them to appellant's home on Ledgewood Drive.

When the van stopped on Ledgewood Drive, the RENU agent approached the van on the passenger side. The agent testified that he had not observed any violation of the law. Further, the agent testified that he was not attempting to arrest appellant. When the agent reached the van, appellant drove away. The RENU agent contacted the Norwood Police Department and requested that they stop appellant. Subsequently, appellant was stopped and detained by the Norwood police. The RENU agent interviewed appellant at the Norwood police station. Appellant denied being at the Ramada Inn. Following the interview appellant was released, no charges being filed against appellant at that time.

The RENU agent relayed his suspicions about appellant's

activities to the Blue Ash Police Department. An officer from the Blue Ash Police Department proceeded to the Ramada Inn. The motel security guard showed the officer the room for which appellant had registered; however, the room was not entered at that time. The officer made several unanswered telephone calls to the room. At approximately 1:00 or 1:30 a.m. on December 29, 1983, the security guard double locked the door of the motel room, denying anyone without a passkey access to the room. Evidence was adduced at trial that only the security guard, the manager and the night manager of the Ramada Inn had passkeys which would open the double lock.

The record reveals that although a registration card for a motel room had been filled out in appellant's name, no witnesses testified that they had observed appellant sign the card. Payment for the room had been made in advance for the nights of December 28 and 29, 1983. In the afternoon of December 30, 1983 the motel manager, Mr. Carr, opened the room. An officer from the Blue Ash Police Department was present. Carr testified that it appeared that someone had slept in the bed. Carr also observed a bottle and two glasses on a table.

The Blue Ash police officer testified that he searched the room and dusted for fingerprints. In a drawer of a nightstand next to the bed the officer found a key ring, keys, a receipt bearing appellant's name, several other receipts, a box of straws, some rolling papers, a cable television invoice addressed to a Ledgewood Drive address, an envelope containing a Ledgewood Drive return address, a piece of glass, razor blades, a small strainer, a box lid containing marijuana residue and a plastic bag containing orange tablets. Subsequently, the tablets proved to be Obetrol. These tablets form the basis of the charge in count two of the indictment, trafficking in drugs. The officer attempted to lift fingerprints from several items found in the room including a bottle of cognac, the box lid, the drinking glasses, the small strainer, a silver bowl and the bag which contained the orange tablets. Appellant's fingerprints were found on the bottle of cognac.

In addition, two other sets of fingerprints were found on some of the items recovered from the motel room. One set of fingerprints was identified, however the other set remains unidentified.

The RENU agent testified that on January 3, 1984 he arrested appellant for drug abuse pursuant to a complaint and warrant previously issued to the Blue Ash police. However, the evidence showed that the complaint and warrant were not issued until January 4, 1984, one day after appellant's arrest. At the time he arrested appellant, the RENU agent reached into appellant's pocket and retrieved one tablet of Obetrol. This tablet forms the basis of the drug abuse charge in count one of the indictment.

Appellant was indicted for drug abuse and trafficking in drugs. Both counts of the indictment contained the specification that appellant had been previously convicted of a felony drug abuse offense. Appellant was found guilty as charged and sentenced as appears of record.

Appellant's first assignment of error alleges:

> The trial court substantially erred to the prejudice of appellant in overruling appellant's Criminal Rule 29 motions for judgment of acquittal, as to count two of the indictment.

The Supreme Court of Ohio has stated in *State* v. *Bridgeman* (1978), 55 Ohio St. 2d 261, 381 N.E.2d 184, syllabus:

> Pursuant to Crim. R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.

In the case *sub judice*, appellant was seen entering the Blue Ash Ramada Inn on December 28, 1983. A registration card for room 273 was filled out in appellant's name. The room was paid in advance for two nights. One half hour after

entering the Ramada Inn, appellant was seen exiting the motel. Approximately sixty to ninety minutes later room 273 was double locked, denying access to anyone without a passkey. When appellant was stopped by a police officer he denied having been at the Ramada Inn.

On December 30, 1983, room 273 was opened and searched. In a nightstand near the bed a quantity of Obetrol pills were found. A receipt bearing appellant's name was also found in the nightstand. In addition, keys to several vending machines were recovered. Appellant owns a vending machine business. Appellant's fingerprints were found on a cognac bottle in the room.

We find that in the instant case there was sufficient evidence adduced at trial from which reasonable minds could reach differing conclusions as to whether each element of the crime of trafficking in drugs had been proven beyond a reasonable doubt.

Appellant also argues under his first assignment of error that his conviction should be reversed because he presented a reasonable theory of innocence in the face of circumstantial evidence. We disagree.

The Supreme Court of Ohio has stated that a determination of reasonableness includes a determination of whether the theory is reasonable in light of the weight and credibility the trier of fact gives to the evidence. *State* v. *Hankerson* (1982), 70 Ohio St. 2d 87, 92, 434 N.E.2d 1362, 1366, *cert. denied* 459 U.S. 870, 103 S. Ct. 155; *State* v. *Graven* (1978), 54 Ohio St. 2d 114, 119, 374 N.E.2d 1370, 1373. After the trier of fact has rendered his verdict in a case in which circumstantial evidence has been relied upon, an appellate court will reverse that verdict only where the evidence is insufficient as a matter of law to enable the trier of fact to exclude a reasonable theory of innocence. *Id.* The trial court in the matter *sub judice* obviously found that no theory of innocence was reasonable in light of the weight and credibility which he gave to the evidence. We hold that the evidence in the instant case is such that the trial court was not precluded as a matter of law from excluding a theory of innocence.

Appellant's first assignment of error is overruled.

Appellant's second assignment of error alleges that appellant's conviction for trafficking in drugs was against the manifest weight of the evidence. Following a complete review of the record, we cannot say that such a manifest miscarriage of justice was created that appellant's conviction must be reversed.

In addition, appellant reiterates the argument under his first assignment of error that his conviction for trafficking in drugs was based upon legally insufficient evidence. We find that there was substantial evidence upon which the trial court could reasonably believe that all elements of the offense of trafficking in drugs had been proven beyond a reasonable doubt. *State* v. *Eley* (1978), 56 Ohio St. 2d 169, 383 N.E.2d 132.

Appellant's third assignment of error alleges:

> The trial court substantially erred to the prejudice of appellant in overruling the motion to suppress evidence as to count one of the indictment.

In the case *sub judice*, the RENU agent arrested appellant on January 3, 1984. At that time, the agent reached into appellant's pocket and recovered one tablet of Obetrol. This tablet formed the basis for appellant's conviction of drug abuse pursuant to count one of the indictment. The RENU agent testified that he made the arrest pursuant to a warrant signed by an officer of the Blue Ash Police Department. The record reveals that the complaint and arrest warrant were signed and filed on January 4, 1984. Appellant argues that his arrest on January 3, 1984 was a warrantless, unlawful arrest and that therefore, appellant's motion to suppress the evidence recovered at the time of his arrest and search should have been granted. We agree.

Appellee argues that the RENU agent had probable cause to arrest appellant as the agent had knowledge of the drugs found at the Ramada Inn on December 30, 1983. The record is devoid of evidence to support appellee's argument. In addi-

tion, the RENU agent specifically testified that he arrested appellant pursuant to a warrant issued by the Blue Ash Police Department. Under these circumstances, we find that the arrest of appellant was warrantless and unlawful. Therefore, appellant's motion to suppress should have been granted. Appellant's third assignment of error is sustained. There being no other evidence to sustain appellant's conviction for drug abuse, we accordingly reverse appellant's conviction for drug abuse as charged in count one of the indictment.

Appellant's conviction for trafficking in drugs pursuant to count two of the indictment is affirmed. Appellant's conviction for drug abuse pursuant to count one of the indictment is reversed and appellant is hereby discharged as to that count.

SHANNON, P.J., DOAN and HILDEBRANDT, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

APPENDIX B

THE SUPREME COURT OF OHIO
COLUMBUS

Case No. 85-1349

State of Ohio,

Appellee,

v.

James R. Quarles, Jr.,

Appellant.

ENTRY
(Entered November 7, 1985)

Upon consideration of the motion for leave to appeal from the Court of Appeals for Hamilton County, and the claimed appeal as of right from same said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $20.00, paid by John Andrew West.

/s/ FRANK D. CELEBREZZE
Chief Justice

I, James Wm. Kelly, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, this date October 30, 1985.

/s/ JAMES WM. KELLY, Clerk
/s/ SAM I. ADKINS, Deputy

APPENDIX C

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT SUBSTANTIALLY ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING APPELLANT'S CRIMINAL RULE 29 MOTIONS FOR JUDGMENT OF ACQUITTAL, AS TO COUNT TWO OF THE INDICTMENT (T.p. 120).

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

WHEN THE EVIDENCE PRESENTED AT TRIAL IS INSUFFICIENT TO SUSTAIN A CONVICTION, THE TRIAL COURT MUST ENTER A JUDGMENT OF ACQUITTAL.

SECOND ASSIGNMENT OF ERROR

THE JUDGMENT OF CONVICTION IS CONTRARY TO LAW, IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND IS BASED UPON LEGALLY INSUFFICIENT EVIDENCE.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

CONVICTIONS WHICH ARE DEVOID OF EVIDENTIARY SUPPORT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW.

THIRD ASSIGNMENT OF ERROR

THE TRIAL COURT SUBSTANTIALLY ERRED TO THE PREJUDICE OF APPELLANT IN OVERRULING THE MOTION TO SUPPRESS EVIDENCE AS TO COUNT ONE (1) OF THE INDICTMENT (T.p. 97).

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

WARRANTLESS SEARCHES AND SEIZURES ARE PER SE UNREASONABLE, ABSENT SPECIFICALLY DEFINED EXCEPTIONS.

APPENDIX D

SECOND ASSIGNMENT OF ERROR

THE JUDGMENT OF CONVICTION IS CONTRARY TO LAW, IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND IS BASED UPON LEGALLY INSUFFICIENT EVIDENCE.

ISSUE PRESENTED FOR REVIEW AND ARGUMENT

CONVICTIONS WHICH ARE DEVOID OF EVIDENTIARY SUPPORT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS OF LAW.

Appellant incorporates by reference herein the arguments and authorities presented in the First Assignment of Error.

It is the duty of the prosecution to prove all essential elements of the crime charged beyond a reasonable doubt. *State* v. *Bonar*, 40 Ohio App. 2d 360, 319 N.E.2d 388 (1975). When the finding of the court is manifestly in error, it is the duty of the Court of Appeals to set aside the conviction and order a new trial. *State* v. *Larry*, 44 Ohio App. 2d 92 (1975); *State* v. *Clark*, 92 Ohio App. 382, 110 N.E.2d 433 (1953).

Based upon the evidence presented by the State of Ohio and a review of the entire record, the State failed to prove Appellant's guilt beyond a reasonable doubt. The judgment of the court therefore contravenes the due process clause of the Fourteenth Amendment to the United States Constitution.

It is well established that the State, by virtue of the due process clause, must satisfy the reasonable doubt standard in criminal cases. *Johnson* v. *Louisiana*, 406 U.S. 356, 92. S.Ct.1620 (1972). In re *Winship*, 397 U.S. 358 90 S.Ct. 1068 (1970). Proof of guilt beyond a reasonable doubt is implicit in fundamental principles that are essential for protection of life and liberty. *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968); *Leland* v. *Oregon*, 343 U.S. 790, 72 S.Ct. 1002 (1952); *Coffin* v. *United States*, 156 U.S. 432 (1895). The due process clause safeguards against dilution of the principle that

guilt is to be established by probative evidence and beyond a reasonable doubt. *Taylor* v. *Kentucky*, 436 U.S. 478; 98 S.Ct. 1930 (1978); *Estelle* v. *Williams*, 425 U.S. 501, 96 S.Ct. 1691 (1976). Therefore, convictions which are devoid of evidentiary support violate due process of law. *Gregory* v. *City of Chicago*, 394 U.S. 111, 89 S.Ct.946 (1969), *Thomspon* v. *City of Louisville* 362 U.S. 199, 80 S.Ct. 624, (1960).

These constitutional requirements are applicable to criminal prosecutions in the State of Ohio. In this State, a Court of Appeals owes a greater duty than to determine merely whether there was some evidence to support the judgment. The court must determine whether the judgment is supported by the degree of proof which the character of the case requires and to render its judgment accordingly. *Cooper* v. *State*, 121 Ohio St. 562, 170 N.E. 355 (1930).

In determining whether there is evidence to prove a Defendant's guilt beyond a reasonable doubt, the question is whether the record contains evidence from which the trier of fact would be justified in concluding that Defendant was guilty beyond a reasonable doubt. *Atkins* v. *State*, 115 Ohio St. 542, 155 N.E. 189 (1955); *State* v. *Petro*, 148 Ohio St. 473, 76 N.E. 355 (1947).

Given the state of the evidence in this case, the trial court was not justified in concluding that Appellant's guilt was proven beyond a reasonable doubt.

Appellant respectfully requests that the conviction as to Count Two be reversed and Appellant be ordered discharged.